No. 15,070

IN THE

United States Court of Appeals

For the Ninth Circuit

TERRITORY OF ALASKA,

Appellant,

vs.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, MCNEILL & LIBBY, INC., NAKAT PACKING COMPANY, NEW ENGLAND FISH CO., P. E. HARRIS COMPANY, INC., PACIFIC & ARCTIC RAILWAY & NAVIGATION CO., and OCEANIC FISHERIES CO.,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, First Division.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

STATEMENT OF THE CASE.

Appellant has set forth a reference to the opinion of the District Court and has made the jurisdictional statement required. The appellant's statement of the case is substantially correct particularly as to the nature of the case and the procedural steps previously taken. The reference to the action of the trial

court on the appellant's motion to dismiss the appellees' motion to dismiss the complaints we think is immaterial since it was not error and not assigned as error.

We do take an exception to the statement that appellees abandoned the defense that the action is barred by the statute of limitations. It is true Judge Folta said that this ground had been abandoned. (R. 41.) Appellees at no time abandoned this defense although it was not argued before Judge Folta. Judge Hodge recognized this fact in his opinion of January 4, 1956 (R. 67) where he said "In view of this decision the question of the statute of limitations need not be considered."

Appellant has set forth in the appendix to its opening brief all of the pertinent statutes and extracts from the legislative journals. These will not be repeated herein.

In paragraph three of appellants statement it is said that the case involves eight separate complaints seeking to recover $175,000 in taxes, interest and penalties for the years 1949, 1950, 1951 and 1952. We call the Court's attention to the fact that these were all personal actions against the several defendants seeking to recover taxes on both real and personal property combined without any attempt at segregation of one type of property from the other.

QUESTIONS PRESENTED.

There are four questions for consideration of this appeal.

A. Will a personal action lie for the collection of either real or personal property taxes levied pursuant to Chapter 10, SLA 1949 (even if the act had not been repealed)?

B. Did any of the taxes sought to be collected in this action survive the repeal of Chapter 10, SLA 1949 by Chapter 22, SLA 1953?

C. If any such taxes did survive the repeal, is there a remedy available for their collection?

D. Did the trial Court err in rejecting the introduction into evidence of House Bill No. 3 (T 48, 55)?

SUMMARY OF ARGUMENT.

A. Will a personal action lie for the collection of either real or personal property taxes levied pursuant to Chapter 10, SLA 1949, (even if the act had not been repealed)?

It is settled law in Alaska and elsewhere that in the absence of statutory authority no personal action will lie for the recovery of taxes levied on real or personal property. The remedy provided by the taxing statute is exclusive. Chapter 10 SLA 1953, which levied the taxes here involved, does not authorize a personal action, but establishes a lien on the property and provides a method of foreclosure. This was the sole remedy available before repeal. Taxes are not debts and

no common law action in debt or assumpsit will lie for their recovery; nor will equity entertain a non-statutory action for their collection. In the Western states a tax against property can only be collected by an action in rem unless the statute specifically authorizes a suit in personam. The many cases cited by appellant in support of the opposite view all relied on statutory authority for personal recovery.

B. Did any of the Taxes Sought to Be Collected in This Action Survive the Repeal of Chapter 10, SLA 1949 by Chapter 22, SLA 1953?

The taxes sought to be collected by this action did not survive the repeal of the act under which they were levied. At common law the repeal of a statute extinguishes all liability under it unless kept alive by a specific saving clause. Alaska has a general saving statute but it is unlike the Federal saving statute. The act repealing the taxing act had a special savings proviso of its own which is in conflict with the general act. Being later in time and constituting the express will of the legislature the special savings proviso must prevail. The special savings proviso of *the repealing act* saves some taxes but not those sought to be recovered here. The legislature by the special savings proviso of *the repealing act,* having saved some taxes but not others, it must be assumed that they intended to save only those specified. *Expressio unius est exclusio alterius.* (The mention of one is the exclusion of another.) The title of *the repealing act* requires this construction. Other provisions of *the repealing act* also support this view.

C. If any Such Taxes Did Survive the Repeal, Is There a Remedy Available for Their Collection?

The question is moot because no taxes survived the repeal. Even so, the special remedy provided by the taxing act was not saved from repeal and fell with the act. No other remedy is available. Taxation is statutory. Liability to pay cannot be enforced unless so provided by statute. There is no statute available here.

D. Did the Trial Court Err in Rejecting the Introduction Into Evidence of House Bill No. 3 (T. 48, 55)?

The trial court did not err in refusing to receive a certified copy of House Bill No. 3 into evidence. It is not a part of the legislative record which courts may judicially notice when construing ambiguous statutes; nor is the statute under construction ambiguous. The court, however, did take judicial notice of the legislative journals which contain the title, amendments, votes and other pertinent information respecting H. B. No. 3. The court had before it all and more than offered by appellant.

Miscellaneous.

The taxes sought to be collected here are not delinquent taxes because they fell with the repeal. The statute under consideration is not a revenue measure but an act to repeal a revenue measure.

ARGUMENT.

INTRODUCTION.

A wide disparity exists between the views of appellant and appellees respecting the legal issues and legal precedents which are relevant and decisive in this case.

Appellant's version of the controversy is set forth in its opening brief. Because of the disparity mentioned above appellees will present their own view of the cause and will not adopt or attempt to follow the outline or order of presentation used by appellant.

The Alaska Property Tax Act which was Chapter 10 SLA 1949 will be referred to in this brief as *Chapter 10*. Chapter 22 SLA 1953 which repealed *Chapter 10* will be referred to herein as *the repealing act*.

A. WILL A PERSONAL ACTION LIE FOR THE COLLECTION OF EITHER REAL OR PERSONAL PROPERTY TAXES LEVIED PURSUANT TO CHAPTER 10, SLA 1949 (EVEN IF THE ACT HAD NOT BEEN REPEALED)?

1. There Is No Statutory Liability.

Appellant's opening brief contains numerous statements to the effect that the owners of real and personal property in Alaska are personally liable for the taxes levied against such property pursuant to *Chapter 10*. It is stated that this personal liability is imposed directly by statute. We do not deny that such a statutory situation *could* exist. But we point with emphasis to the fact that it does not exist. There is no such statutory obligation as that repeatedly referred to by appellant.

Appellant makes sketchy reference to various provisions of *Chapter 10* which are said to indicate an intention to create a personal liability. A full reading of the act negatives such a construction.

All of the sections of the act referred to by appellant (sections 9, 12, 13, 14, 15, 17, 22, 25, 30 and 37) with the exception of section 37 apply to the procedure to be followed in assessing the property, completing the assessment roll, hearings before the Board of Assessment and Equalization, etc. Section 37 denounces false returns and records.

Sections 32, 33, 34 and 42 which fix the time and mode of payment, establish the lien and provide for its foreclosure, are not referred to by appellant in this respect. These plus the provisions levying the tax are determinative. They do not support appellant's contention. Section 34 provides that "The taxes assessed upon property * * * shall be a lien thereon, * * * and no sale * * * shall * * * affect the lien * * *." Nothing is said about extending the lien to other property of the owner, or making the owner or anyone else personally liable for the discharge of the lien.

The tax is imposed by section 3 which states "There is hereby levied, and there shall be assessed, collected and paid, a tax upon all real property and improvements and personal property in the Territory". Section 4 provides that the tax levied by section 3 upon property within the limits of a municipality "shall be assessed, collected and enforced in the manner prescribed by the property laws of the municipality * * *".

These sections levy the tax on the property and not on the owner. They can be read in no other way. Furthermore, the title to the act is conclusive on the question. It reads "An Act levying a tax on property in Alaska; providing for collection thereof, and allowing certain exemptions; defining offenses and prescribing penalties; and declaring an emergency." See Chapter 10 SLA 1949. (The title does not appear in *the repealing act* as reproduced in Appendix "A" of appellant's opening brief.) The words of the title and of sections 3 and 4 mean what they say. The tax is on the property only—and only the property is liable.

Section 42 which creates the remedy for collection is equally plain. The remedy is by lien foreclosure. The lien is on the property—not on the owner. The pertinent language of the section provides that "The Tax Commissioner may, with the assistance of the Attorney General * * * proceed to foreclosure of said liens". No suggestion of personal liability or deficiency judgment is found in the section.

2. The Rule in Alaska.

It is settled law in the Territory of Alaska that in the absence of authority conferred by the taxing act no personal action can be maintained for the collection of a tax assessed against real or personal property. Only the property is liable. The collection remedy provided by the taxing statute is exclusive. The rule was stated by the late Judge Folta in *City of Yakutat v. Libby, McNeill & Libby,* 13 Alaska 378, 381, 98 F. Supp. 1011 as follows:

> "The rule that in the absence of statutory provision, a personal action lies for the enforcement of the collection of a tax appears to be limited to taxes assessed against individuals. 1 Cooley on Taxation, 3rd Ed. 17. Nothing contrary to this limitation appears in the cases cited in support of the only statements of the rule discovered at 61 *C.J.* 1052, Sec. 1377, Note 85; 51 *Am. Jur.,* Sec. 984, Note 13; and *Marion County v. Woodburn Mercantile Co.,* 60 Or. 367, 119 P. 487, 41 LRA NS 734."

No appeal was taken in *City of Yakutat v. Libby, supra,* but in a later case arising out of efforts of the City of Yakutat to collect the same tax, the record in the earlier proceeding was made a part of the record on appeal by stipulation. Consequently this court had the whole record before it when the later case of *Libby, McNeill & Libby v. Yakutat,* 14 Alaska 367, 206 F. 2d 612, was heard and decided.

The decision by this court in *Libby, McNeill & Libby v. Yakutat, supra,* impliedly recognizes the correctness of Judge Folta's holding in the earlier case. It is inconsistent with any other view. The decision points out that:

> "The court's power to order property sold for taxes has its sole and only source in the statute."

A similar statutory authority would have been required had the action been in personam. It was a previous action in personam which Judge Folta dismissed. The city then attempted to avail itself of an existing statutory remedy by way of lien foreclosure.

Marion County v. Woodburn Mercantile Co., supra, cited by Judge Folta, contains a complete discussion of the question and is considered a leading case on the subject. As reported in 41 LRA NS 734, it contains an exhaustive footnote analyzing all the state and federal decisions on the subject as of that date.

3. The Rule in Other Circuits.

The rule denying an equitable action for recovery in the absence of statute was announced as a fundamental principle of law by the Sixth Circuit Court of Appeals, in *Preston v. Sturgis Milling Co.* (1910) 183 F. 1, and personal liability was denied for lack of legislative authority by the Eighth Circuit Court of Appeals in *Helvering v. Johnson County Realty Company* (1922) 128 F. 2d 716. The *Helvering* decision follows the rule in Iowa where the case arose. The rule in Iowa was restated in *Re Estate of John C. McMahon* (1946) 21 N.W. 2d 581, 163 ALR 720. For the rule in Nebraska see *Midland Guaranty & Trust Co. v. Douglas County* (8th Circuit) 217 F. 358.

4. The Text Writers.

In *Cooley on Taxation,* 4th Ed. Vol. 3, p. 2630, Section 1330, the rule is stated as follows:

> "However, in most jurisdictions it is held that statutory remedies for the collection of delinquent taxes are exclusive and preclude the maintenance of an action at law, i. e. that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie." Cases are cited from Georgia, Iowa,

Kansas, Kentucky, Missouri, Nebraska, New Jersey, Oregon, South Dakota, Utah, Virginia and West Virginia.

Contrary decisions for the most part, are based on the premise that taxes are a debt and that assumpit will lie. But the Supreme Court of the United States has repeatedly held that a tax levied on property is not a debt.

5. Taxes Are Not Debts.

A full discussion of this point is found in *Meriwether v. Garrett,* 102 U.S. 472 at pages 513 and 514, where the court among other things said:

> "Taxes are not debts. It was so held by this court in the case of *Oregon v. Lane County,* reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum.* Nor is their nature affected by the fact that in some states, and we believe in Tennessee, an action of debt may be instituted for their recovery. The form of procedure cannot change their character."

See also:

> *Florida C. & P. R. Co. v. Reynolds,* 183 U.S. 471, 22 S. Ct. 176, 46 L. ed. 283.

The same rule was laid down long ago by the District Court of Alaska. See *In Re Street Assessments in the Town of Seward* (1917) 5 Alaska Reports 726,

where Judge Brown quoted from 37 Cyc., p. 710 with approval as follows:

> "As the obligation to pay taxes does not rest upon any contract express or implied, or upon the consent of the taxpayer, a tax is not a debt in the ordinary sense of that word; and for the same reason taxes are not assignable as ordinary debts, unless it is expressly so provided, nor are they the subject of set-off between the taxpayer and the state or municipality."

A different rule has sometimes been applied where the tax sought to be collected is a license or income tax imposed directly on the person as a privilege of doing business or a stamp tax imposed as a necessary incident to a transaction. *Milwaukee County v. M. E. White Co.* 296 U.S. 268, 271, 56 S. Ct. 229, 80 L. ed. 220, 224 and *United States v. Chamberlin,* 219 U.S. 250, 31 S. Ct. 204, 55 L. ed. 204, both cited in appellant's opening brief are such cases. In those cases the tax was not a levy on real or personal property.

6. The Action Is In Rem—Not In Personam.

In the Western states the courts have uniformly held that a tax levied against property either real or personal cannot be collected by a proceeding in personam unless specifically authorized by the statute. Otherwise the proceeding must be in rem against the property.

The Supreme Court of Montana said:

> "Every piece of real estate is liable for the taxes upon it, and the owner thereof is not personally liable therefor." *Calkins v. Smith* (1938) 78 P. 2d 74, 76.

In Oklahoma the rule was stated in the Syllabus as follows:

> "Taxes are not true 'debts' and no personal judgment may be obtained for taxes." *Bell v. Trosper,* 77 P. 2d 544.

See also

McDonald v. Duckworth, 173 P. 2d 436.

The Supreme Court of California passed on the question in 1951 in *Helvey v. Sax,* 229 P. 2d 796. Section 5 of the Syllabus in this case reads as follows:

> "Where a public agency with taxing powers charges a tax upon land, no resort can be had against the owner or his personal estate, because the tax levied is in rem and not in personam."

The same controversy was again heard on appeal and the court again said:

> "A property tax operates in rem against the property." *Helvey v. Sax,* 237 P. 2d 269, 271.

The Supreme Court of Washington applied the rule with equal force to personal property in *Puget Sound Power & Light Co. v. Cowlitz County,* 234 P. 2d 506, 512, when the court stated:

> "However, we are satisfied that this court never intended to intimate that the owner of personal property was personally liable for the taxes levied thereon. In the absence of statutory authority he is not subject to suit by the county to compel payment."

The Supreme Court of Oregon in 1943 stated the rule as applicable to both real and personal property in these words:

> "An assessment for tax purposes does not create a personal debt except as declared by statute. *Marion County v. Woodburn Mercantile Co.,* 60 Or. 367, 119 P. 487, 41 LRA NS 730." *City of Salem v. Marion County,* 137 P. 2d 977, 985.

The Arizona Supreme Court in *Santos v. Simon,* 138 P. 2d 896, speaking in 1943 said:

> "That is the point. The owner does not owe the tax levied against his property. The whole proceeding to collect taxes is in rem".

For the rule in Kansas see *Board of Commissioners of Sherman County, Kansas v. Alden* (1944) 158 Kansas 487, 148 P. 2d 509.

We have examined all of the above cases carefully, together with the authorities cited therein. We can find no instance where the decision turned on any statutory language denying personal liability. The absence of a specific provision granting a right of action against the owner is the test. Because that was lacking, no personal action was permitted in these cases. Chapter 10, which is under consideration in this case, does not purport to grant a personal action. The simplest reading of the act serves to disprove the statement on page 18 of appellant's opening brief that: "The Alaska Property Tax Act specifically imposes a personal obligation on the 'taxpayer' who is 'assessed and taxed' ". On page 24 of his opening brief the Attorney General concedes that: "Admittedly, the Alaska Property Tax Act does not provide for (1) a specific remedy for the collection of taxes against the person,".

7. Appellant's Authorities.

The proposition is conclusive. Notwithstanding this fact, the Attorney General on page 22 of his opening brief states that, "Even under statutes imposing the tax solely *on the property,* the owner thereof has been held personally liable".

He cites some thirteen state decisions and one federal decision purportedly supporting his position. A careful reading of all of the state decisions and of the authorities cited in them, discloses that in each case some provision of the state statute was relied upon as the basis of personal liability. Two of the cases were decided in Tennessee where, as the Supreme Court points out in *Meriwether v. Garrett, supra,* an action in debt may be instituted for the recovery of taxes. The federal decision is *North Umberland County v. Philadelphia and Reading Coal and Iron Co.,* 131 F. 2d 562 decided by the Third Circuit Court of Appeals in 1942. It involves efforts to compel a trustee in bankruptcy to pay local real estate taxes on lands of the debtor from funds in his possession. The case turns on the highly interesting and historical practice based on early colonial enactments and customs whereby real property taxes in Pennsylvania are collected from the occupant of "seated" (occupied) lands and by sheriff's sales of "unseated" (unoccupied) lands. It gives no comfort to the position of the Attorney General in this case. Two of the thirteen decisions also turn on Pennsylvania law.

B. DID ANY OF THE TAXES SOUGHT TO BE COLLECTED IN THIS ACTION SURVIVE THE REPEAL OF CHAPTER 10, SLA 1949 BY CHAPTER 22, SLA 1953?

1. Common Law.

The answer is no. Under the common law the repeal of a statute extinguished all penalties and liabilities created by the statute and unpaid on the date of the repeal unless the same were kept alive by a specific savings clause. The rule applies to repealed tax statutes. 50 *Am. Jur.* p. 532, § 524, Statutes; 51 *Am., Jur.* p. 353 § 300, Taxation; *Flanigan v. County of Sierra,* 196 U.S. 553, 25 S. Ct. 314, 49 L. ed. 597; *Ex parte McCardle,* 74 U.S. 506, 19 L. ed. 264; *Norris v. Crocker,* 54 U.S. 429, 14 L. ed. 210. There is no authority to the contrary. Appellant makes no such assertion.

2. General Savings Act.

Many jurisdictions, including the United States, (Secs. 29 and 109, Title 1, U.S.C.A.) have enacted general savings statutes amendatory to the common law and designed to save rights and remedies accrued under repealed statutes prior to the date of repeal. The United States General Savings Statute was construed and applied by this court in *U. S. v. McNair,* 180 F. 2d 273. General savings statutes are derogatory of the common law and are strictly construed by the courts particularly where penalty or forfeiture is involved. *U. S. v. Auerbach,* 68 F. Supp. 776 (D.C. Cal. 1946); *U. S. v. Hark* (D.C. Mass. 1943), 49 F. Supp. 95. The cases are clear on the proposition that in the absence of a savings statute all penalties, forfeitures,

and liabilities are lost. In *Hertz v. Woodman,* 218 U.S. 205, 54 L. ed. 1001, 30 S. Ct. 621, the Supreme Court said:

> "an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations, and as a remission of penalties and forfeitures dependent upon the destroyed statute."

3. In Alaska.

Alaska has a general savings statute. The original general savings act was previously found in Chapter 7 of the Session Laws of 1929 and was identical in effect with the federal act previously mentioned. In 1947 the Territorial Legislature enacted a new savings statute designated as Chapter 18 of the Session Laws of 1947. It is entirely different from the previous one. The new act was carried into the 1949 codification as Section 19-1-1, A.C.L.A. 1949. It was reenacted without change material here by Chapter 4, Extraordinary Session Laws of 1955.

4. Statutory Situation in Alaska.

The statutory situation in Alaska is as follows:

(1) The taxes sought to be collected were levied pursuant to the Alaska Property Tax Act, Chapter 10 SLA herein referred to as *Chapter 10,* which was repealed by Chapter 22, SLA 1953, herein referred to as *the repealing act.*

(2) The original Alaska General Savings Statute of 1929—Chapter 7, *Laws of 1929,* Sec. 1:

> "The repeal or amendment of any statute shall not have the effect to release or extinguish any

penalty, forfeiture or liability incurred in a civil action under such statute unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

identical in effect with the Federal General Savings Statute—Sections 29 and 109, Title 1, *U.S.C.A.*

"*Repeal of statutes as affecting existing liabilities.* The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

was superseded by the limited, obscurely worded Alaska General Savings Statute of 1947—Section 19-1-1, *A.C.L.A.*

"*Effect of repeals or amendments.* The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and

punished under the former law as if such repeal or amendment had not been made."

(3) The act of 1953 herein called *the repealing act* contains a specific but limited savings proviso—Section 2(a) Chapter 22 *Laws of 1953*—

"Section 1 of this Act shall not be applicable to: (a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district;"

(4) The two Alaska General Savings Statutes and the savings proviso of *the repealing act* all deal with the same subject and all are in conflict with each of the others.

5. The Alaska General Savings Statute.

The first sentence of the current *Alaska General Savings Act, supra,* is restated here:

"The repeal or amendment of any statute shall not effect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment."

If this were the only statutory pronouncement on the subject it might be argued that accrued taxes survived the repeal of *Chapter 10.* But this is not the only statutory language applicable. *The repealing act, supra,* contained a savings provisio of its own which is

clearly in conflict with the general savings act above quoted.

6. The Proviso of the Repealing Act Overrides the General Savings Statute.

The later, more limited savings proviso of *the repealing act,* being more nearly in conformity with the common law, being later in time than the earlier general savings statute, and constituting the express will of the legislature with respect to taxes to be saved by the repeal of *Chapter 10,* must prevail. Sec. 50 *Am. Jur.* p. 534, Statutes, § 528; 82 *C.J.S.* 1015, Statutes, § 440; *Wilmington Trust Co. v. U. S.* (D.C. Del.), 28 F. 2d 205.

In *Wilmington Trust Co. v. U. S., supra,* the court said at p. 208:

> "As the estate tax provisions * * * were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others."

The Attorney General criticizes *Wilmington Trust Company v. U. S., supra,* and cites five cases which are alleged to depart from or overrule the holding in that case.

A very careful reading of these five decisions discloses that the criticism of the *Wilmington* case in all of them is directed toward the court's construction of a provision of the Internal Revenue Act. No criticism or adverse comment is found in any of these cases touching on the application of the savings statute or savings proviso. The Attorney General offered

similar criticisms of the *Wilmington* decision in his brief below. They are commented upon in Judge Hodge's opinion (R. 61).

> 50 *Am. Jur.* Sec. 528 states the rule as follows: "Where the savings clause refers to a specific matter, it has been taken as an indication of a legislative intent to save nothing else from the repeal."

In California the rule has been twice applied in cases where amendments to the state constitution dealing with specific subjects were at variance with earlier general provisions of the constitution.

> "As Section 22 of Article 20 was adopted last, as it is special in dealing with this subject * * * its provisions must be held to control".
>
> *Los Angeles Brewing Company v. City of Los Angeles,* (Cal. 1935), 48 P. 2d 71, 74.

> "Being special in nature and adopted later, the constitutional provision * * * must be held to control in the express field that it covers."
>
> *Ainsworth v. Bryant,* (Cal. 1949), 211 P. 2d 564, 568.

7. Expressio Unius Est Exclusio Alterius.

Furthermore, the rule of statutory construction, *expressio unius est exclusio alterius* (the mention of one is the exclusion of another), requires a holding that the legislature intended to save the taxes specifically mentioned in *the repealing act* and to exclude all others. The rule is stated clearly in *Sutherland on Statutory Construction,* 3rd Ed. Vol. 2, p. 412, Sec.

4915, and again at p. 416, Sec. 4916, where the author says that the rule has received endorsement in the application of statutes on revenue. The Fourth Circuit Court applied the rule in 1932 in *Jones v. Crosswell, Inc.,* 60 F. 2d 827, where it said on page 828, "It is a well settled principle of statutory construction that the expression of one thing excludes others not expressed.", and again in *Rybolt v. Jarrett,* 112 F. 2d 642, 645. The Alaska District Court in *Territory ex rel Sulzer v. Canvassing Board,* 5 Alaska 602, 622 said the rule was a canon of construction known to all lawyers.

The rule was applied by the Supreme Court without use of the expression in *Townsend v. Little,* 109 U.S. 504, 27 L.ed. 1012, 3 S.Ct. 357, where it was said at page 512 of the decision as reported in 109 U.S.:

> "According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses."

Nor do we contend, as inferred on page 59, footnote 10, of appellant's brief, that the maximum is substantive law or that it can be used to override clear and contrary evidence of legislative intent. We agree with the statement of counsel for the Territory that the rule is

only an aid in ascertaining legislative intent and may not be employed to defeat such intent. Nor are we attempting to so apply it. We are somewhat puzzled over the citation of three Alaska cases in this portion of the Territory's brief. We refer to the cases of *U. S. v. Hardcastle,* 10 Alaska 254; *Anderson v. Smith,* 8 Alaska 470, and *Freeman v. Smith,* 8 Alaska 229. No rule of statutory construction helpful to the Territory is enunciated in these cases.

The proposition is stated as follows in American Jurisprudence and Corpus Juris Secundum:

50 *Am. Jur.* 535 Statutes, Sec. 528. Express savings provisions in repealing statutes.

> "§ 528. *Express Savings Provisions in Repealing Statutes.* Frequently, there are express savings clauses in repealing statutes, which continue the law in force as to all cases to which they apply. Sometimes, such a savings provision does not extend to matters other than suits and processes pending at the time. Where the savings clause refers to a specific matter, *it has been taken as an indication of a legislative intent to save nothing else* from the repeal. In this respect, it has been held that, *where a repealing statute contains a special savings clause, a general saving statute in force in the state does not apply,* and no rights or remedies are saved, except such as are saved by the special saving clause." (Emphasis supplied.)

82 *C.J.S.* 1015 Statutes, Sec. 440, Saving Clauses.

> "General saving clauses are not to be regarded as attempts on the part of the legislatures enact-

> ing them to curtail the authority of succeeding legislatures by limiting in advance the effect to be given their enactments. *They are themselves subject to either express or implied repeal by subsequent acts, and cannot operate to save provisions of repealed statutes contrary to the clear language of the repealing act. In some jurisdictions they have been held not to apply to repealing statutes having a specific saving clause.* * * *'' (Emphasis supplied.)

Therefore, since the 1953 Territorial Legislature expressly saved

> "(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district",

it would follow that the general saving statute would have no application in this case and that the later specific saving clause overrides the earlier general savings statute.

8. State v. Showers.

The rule established long ago in the Kansas case of *State v. Showers,* (Kan. 1885), 8 P. 474, still prevails and has been iterated and reiterated by many courts since. In that case the Supreme Court of Kansas was considering the effect of a general savings statute as against a later specific savings proviso contained in the repealing act.

State v. Showers, 8 P. 474, at pages 476, and 477:

"The question as to what should be repealed and what saved was before the legislature. They had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. *Expressio unius est exclusio alterius.* The legislature evidently intended that the special saving cause which they enacted in section 19 of the Act of 1885 should take the place of all others, so far as prosecutions under original section 7 were concerned; and *that in cases where the special saving clause could apply the general saving statute should have no operation.* 'It is a well-settled rule of construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it.' *Felt v. Felt,* 19 Wis. 196." (Emphasis supplied.)

* * * * * * *

"If, however, the saving clause in section 19 of the act of 1885 was not intended by the legislature to cover the entire ground, and to be a substitute for the general saving statute so far as cases like this are concerned, then the saving clause contained in section 19 of the Act of 1885 has no office to perform, but is absolutely worthless, for the general saving clause would save all that it saves and very much more. Such an interpretation of

> the law as this would violate all proper canons of construction. It would in effect say that the legislature had done the very foolish thing of enacting a saving clause which can have no real operation at all, and can subserve no actual purpose whatever. 'It is a well-settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance, which is altogether inadmissible.' *Ellis v. Paige,* 18 Mass. 45."

The general savings statute of Kansas at that time read as follows:

> "* * * nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

It was identical in effect with the Alaska General Savings Act of 1947, set forth on page 18 supra.

The special saving proviso in the statute before the Kansas court stated:

> "All prosecutions pending at the time of the taking affect of this act shall be continued the same as if this act had not been passed."

(The savings proviso was preceded by language affecting an outright repeal.)

The question involved was whether prosecutions could be commenced after repeal for offenses committed before repeal. The court held that they could not because only pending prosecutions were saved.

The *Showers* case has been distinguished but only by cases in which the General Saving Act in question contained wording similar to that found in the Federal Savings Statute. (". . . unless the repealing act shall so expressly provide, . . .")

See Federal Savings Statute, Secs. 29 and 109, Title 1, *U.S.C.A.* p. 18, supra.

See also:

Great Northern Ry. Co. v. U. S., (8th Cir. 1907), 155 F. 945;

U. S. v. Chicago, St. Paul, Minneapolis & Omaha Railway, (D.C. Minn. 1907), 151 F. 84;

U. S. v. Standard Oil Co., (D.C. Ill. 1907), 148 F. 719.

State v. Showers was quoted in the three cases just cited. In those cases, the general savings statute under consideration was the federal act, previously quoted on page 18 hereof. This previously quoted statute provides that no liability shall be released or extinguished by repeal "unless the repealing act shall so expressly provide". The decisions in those cases point out the contrasting language of the Federal and Kansas General Savings Statutes. The same contrast exists here between the Federal and Territorial General Savings Statutes. See also *U. S. v. Chicago, St. Paul, Minneapolis & Omaha Railway* (D.C. Minn. 1907), 151 F. 84. In that case, the court after quoting both the Federal statute and the Kansas statute said on page 90 of the decision:

"It will be noted that the words of the Kansas statutes above quoted are far from identical with those of the federal statutes now being considered. The Kansas statute of construction contains the words 'unless such construction would be inconsistent with the manifest intent of the Legislature, or repugnant to the context of the statute', and thus leaves open to the courts the application of the recognized canons of construction to ascertain from the language of the repealing statute and the context of the statute the intent of the Legislature. There are no such words in section 13, and the Kansas statute does not provide, as does section 13, that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability under the repealed statute, unless the repealing act shall so expressly provide. Under the Kansas statute it was not necessary to expressly provide in the repealing act that a certain class of offenders shall be released from prosecutions, but under the federal statute it is imperative that there should be such an express provision. The words 'unless the repealing act shall so expressly provide' differentiates the two statutes, and in my opinion make the Kansas case of little, if any, value in determining the question now under consideration."

It will be noted that the Kansas case and the three federal cases immediately above cited all deal with attempted criminal prosecutions. But they each turn on a general savings statute applicable alike to civil and criminal actions. The statute being construed is not a criminal statute but a general savings statute, alleged to have been overriden by a later special sav-

ings proviso. The General Savings Statute reads the same whether applied to a civil or criminal action. It must be construed the same. The same words in the same statute must have the same meaning. This court held Secs. 29 and 109, Title 1, *U.S.C.A.* quoted on page 18, supra, to have equal application to civil liabilities. *U. S. v. McNair, supra.* Such has been the uniform interpretation since *Hertz v. Woodman, supra.*

The Alaska General Savings Statute is identical in effect with the then Kansas Act. It was made so deliberately by the Alaska Legislature in 1947. Prior to 1947 the Alaska Act was identical in effect with the present federal act. The legislature changed the rule and adopted a statute paralleling the Kansas Act. The federal parallel was abandoned.

See also *Friend v. Levy,* 80 N.E. 1036, decided by the Supreme Court of Ohio and *Meriwether v. Garrett,* 102 U.S. 472, 26 L.ed. 197.

9. The Title as an Aid to Construction.

The construction suggested above becomes conclusive from examination of the title of *the repealing act,* which reads as follows:

> "To repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949; *excepting from repeal certain taxes and tax exemptions;* and declaring an emergency." Ch. 22, SLA 1953. (Italics supplied.)

Different courts have given various weights to the wording of the title of acts as an aid to construction.

Courts in those jurisdictions where, like in Alaska, the constitution or organic act (See Alaska Organic Act, Sec. 8) requires the purpose of the act to be stated in its title have always given greater consideration to the title as an aid in construction. See 50 *Am. Jur.* p. 302, Statutes, Sec. 313. See also *Sutherland on Statutory Construction,* Third Edition, Vol. 2, p. 344, Sec. 4802.

In 1910, the Ninth Circuit Court of Appeals in *Sesnon Co. v. U. S.,* 3 Alaska F. 538, 182 F. 573, which arose in Alaska and involved an act of Congress, stated at page 576 of the decision as reported in 182 F.

> "Where doubt exists as to the meaning of the statute, the title may be looked to for aid in its construction"

The language above was quoted with approval by Judge Murane in *U. S. v. Jourden,* 4 Alaska 354, decided in the Second Division in 1911. If any doubt exists that the legislature saved and intended to save only the taxes levied or to be levied by a municipality, school or public utility district, such doubt is resolved by an examination of the title of the repealing act.

> "To repeal the Alaska Property Tax Act * * * excepting from repeal certain taxes and tax exemptions; * * *."

10. No Taxes Survived.

It is clear then that the Alaska General Savings Act being in conflict with the special saving clause of *the repealing act* has no application and saved no taxes.

It is equally clear that Section 2(a), the special savings proviso of *the repealing act,* saved only the taxes levied or about to be levied by municipalities, school or public utility districts. Those were the taxes and the only taxes saved or which survived the repeal. They are not involved in this litigation.

The argument advanced by appellant to the effect that the purpose of the special savings clause in *the repealing act* was to grant something additional in the way of taxing power to municipalities, school and public utility districts and save something for these political entities that would not otherwise be saved by the General Alaska Saving Statute, falls of its own weight. Section 2(a) covers two situations which may be read separately as follows:

> (1) Sec. 1 of this act shall not be applicable to "any taxes which have been levied and assessed by any municipality, school, or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended,"
>
> and,
>
> (2) Sec. 1 of this act shall not be applicable to any taxes "which are levied and assessed during the current fiscal year of such municipality, school or public utility district."

The purpose of situation (1) is obvious. It was to save the taxes levied by municipalities, school districts and public utility districts which had been levied pursuant to *Chapter 10* since its enactment in 1949 and which had not been paid. The remedial provisions of Chapter 10 were not saved by this provisio

or by the Alaska General Savings Statute. The legislature knew that was not necessary because a remedy is provided by other provisions of the Alaska Statutes. See Sec. 16-1-11 et seq.; 37-3-54, and 49-2-29; ACLA 1949.

Situation (2) has the effect and the sole effect of delaying the effective date of the repeal as to taxes levied by municipalities, etc. during their current fiscal year. This is approximately the same result as to municipalities, etc. sought by certain members of the legislature when they tried to strike the emergency clause and make the repeal effective January 1, 1954. (P. 38 App. "G" appellant's opening brief.) That date would in most cases have covered "the current fiscal year". Municipalities determine their own fiscal year for tax purposes (16-1-112 A.C.L.A. 1949) and the legislature could hardly know the exact dates established by the various municipalities.

What the legislature did know, as to both situations, was that many of the municipalities, school districts and public utility districts relied heavily, for both current and past years, on the taxes levied under *Chapter 10. Hess v. Mullaney,* 213 F. 2d 635, 642.

In the case of school districts this comprised all, or most all of their total levy. The procedure for collection of delinquent taxes, including the portion thereof levied by the Alaska property tax law, accruing to municipalities and school districts is by filing delinquent tax rolls in the office of the Clerk of the District Court, publishing a list of the taxes with notice of delinquency, and petitioning the court for

an order of sale. See *Libby, McNeill & Libby v. City of Yakutat, supra.*

There is no statutory requirement that this be done every year. No doubt this court, from the municipal tax cases which have come to it from Alaska, is familiar with the general practice in municipalities and school districts of allowing several years' delinquent taxes to accrue and then bringing one roll before the court for all the years, with one petition for order of sale. In one case appealed to this court, *Town of Skagway v. Pacific and Arctic R. R. Co.,* No. 14215 (1954), the city had included twelve years' taxes in one proceeding (see R. p. 3 of that case).

Therefore what the legislature saved by section 2 of *the repealing act* was these accumulated unpaid taxes of municipalities and school districts, and the taxes levied or in the process of levy by them for the current year. This is readily understandable, for none of them had levied a separate municipal or school district tax completely apart from the ten mill tax levied by *Chapter 10.* (*Hess v. Mullaney, supra.*) The local levy made by the municipalities and school districts was superimposed on the ten mills levied by *Chapter 10.* The total levy was from twelve to twenty mills. *Chapter 10* taxes constituted the bulk of the levy and unless saved from repeal the taxpayer would likely deduct them from his tax statement and bankrupt the municipality or school district.

The taxes levied by *Chapter 10* on property outside municipalities and school and public districts, less than one-third of the total amount levied within the

local taxing units (*Hess v. Mullaney,* 213 F. 2d 635, 639), were in a different category. They were levied and collected by territorial officials for territorial purposes. The Territorial Legislature could deal with these with a free hand and without fear of disturbing the financial structure of municipalities, school districts and public utility districts.

11. Section 2(b) of the Repealing Act.

Section 2 of Chapter 22 SLA reads as follows:

"Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) *any exemptions from the taxes referred to in subsection (a) of this section, which have been granted under the provisions of Section 6(h) of Chapter 10, Session Laws of Alaska 1949."* (Emphasis supplied.)

What was the purpose of Section 2(b) italicized above? It was to insure that exemptions granted by the Tax Commissioner under the industrial incentive clause of *Chapter 10* (Section 6(h), Chapter 10) would continue in effect as to taxes previously levied, or to be levied, during the current year by municipalities, school and public utility districts. Section 2(b) made no effort to save such exemptions as to taxes

levied outside municipalities, etc. The legislature clearly thought that unnecessary. Why? Because taxes outside municipalities were not intended to survive the repeal. No exemption was necessary since there were no taxes outside of municipalities, etc. against which the exemption could apply.

Does the Attorney General contend that the legislature intended to save the taxes levied prior to repeal on property outside municipalities, etc., but to repeal and remove the exemptions granted under the industrial incentive clause as to such property and at the same time continue such exemption as to property within the municipalities, etc. Such a distorted interpretation is clearly untenable. The legislature was more consistent. It preserved the exemption as to the taxes saved—"the taxes referred to in subsection (a) of this section".

C. IF ANY SUCH TAXES DID SURVIVE THE REPEAL, IS THERE A REMEDY AVAILABLE FOR THEIR COLLECTION?

From what has been said before the proposition is moot. Since the taxes did not survive the repeal the question of whether or not a remedy for their collection exists is academic. However, for the purpose of argument, and only for that purpose, we will discuss the existence or non-existence of a remedy for the collection of any taxes levied outside the boundaries of municipalities, public utility districts or school districts, which might have survived the repeal of *Chapter 10.*

1. **Chapter 10.**

It requires no argument to establish the proposition that when *Chapter 10* was repealed the special remedies provided by it for the collection of taxes levied under it, ceased to exist as of the effective date of the repeal unless saved by (1) General Alaska Savings Act, or; (2) the special savings proviso of *the repealing act.*

2. **The Alaska General Savings Act.**

We will first consider what if anything was saved by way of remedy under the terms of the Alaska General Savings Act. The language of the Alaska General Savings Act dealing with remedial matters is as follows:

> "* * * nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be *enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute* save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made * * *" (Emphasis supplied.)

Search for a remedy here is futile. The act provides the following methods of enforcing such taxes and penalties as might have been saved:

(a) under the repealing * * * statute; or

(b) if the repeal * * * statute be limited by the ex post facto and other provisions of the con-

> stitution, then enforcement shall be "under the former law as if such repeal * * * had not been made".

The term "ex post facto" refers only to criminal matters. No limitation by "other provisions of the Constitution" can be visualized, consequently enforcement cannot be had "under former law" as if such repeal * * * had not been made".

Even the stronger and more emphatic Federal General Savings Statute found in Sections 29 and 109, Title 1 *U.S.C.A.,* quoted on page 18 supra, will not operate to save the special remedies of a repealed statute. This was indicated by the Supreme Court in the recent case of *Bridges v. United States,* 346 U. S. 209, 97 L. ed. 1557, 73 S. Ct. 1055, when the court on page 227 of the decision as reported in 346 U. S. quoted the federal statute in a footnote preceded by the following statement:

> "See also, the general saving clause that was in the revised statutes but has been regarded as not applicable to matters of remedy and procedure."

See also *U. S. v. Obermier,* 186 F. 2d 243, 253, where the Second Circuit Court of Appeals held that the Federal Savings Statute does not save remedies.

The net result is that the territory is relegated to remedies "under the repealing * * * statute". *The repealing act* contains no remedial provisions and saves no remedies of any kind and did not intend to. It did not even save remedies for the collection of the taxes saved. The legislature knew that was not

necessary because as previously stated other provisions of the Alaska Code provided a remedy for the enforcement and collection of taxes levied and assessed by a municipality, school, or public utility district. See Sec. 16-1-111 et seq.; 37-3-54, and 49-2-29; ACLA 1949.

3. Remedy Under the Savings Proviso.

As above stated the savings proviso of *the repealing act* of 1953 saved no remedies and did not pretend to.

4. No Remedy Exists.

Taxes together with actions for their enforcement and collection are the creatures of statute. Just as no personal action will lie for their collection in the absence of a personal liability founded on statute so also it is true that no action in rem by way of delinquent tax roll proceedings, statutory lien foreclosures, etc. can be maintained unless the same is founded on statute.

> "All taxation is statutory, and, while it is the duty of every citizen to bear his just proportion of the burden of supporting national, state and local government, he cannot be compelled to do so except in a way provided by a statute. Liability to pay taxes arises from no contractual relation between the taxable and the taxing power, and cannot be enforced by common law proceedings unless a statute so provides. They can be collected in no other way than that pointed out by the statute."
>
> *Schmuch v. Hartman,* 222 Pa. 190, 195, 70 Atlantic 1091, 1092.

Prior to the repeal of *Chapter 10,* only one kind of action was available to the Territory to enforce collection of taxes levied outside of municipality, school and public utility districts. That action was by way of delinquent tax roll procedure provided for in Section 42 of *Chapter 10.* No personal action could have been maintained then and no personal action can be maintained now. The delinquent tax roll procedure provided for by Section 42 of *Chapter 10* and available to the Territory prior to its repeal, fell with the repeal. It was not saved by (1) the Alaska General Savings Statute, or (2) the special savings proviso of *the repealing act.* Neither of these savings provisions pretended to authorize the continued use of the remedial provisions of *Chapter 10* after its repeal. It was the exclusive remedy and it was lost by the repeal.

> "§ 529. *Pre-existing Remedies as Affected by Repeal.* It is firmly established that there is no vested right in any particular mode, procedure or remedy, and it is a general rule that, where a statute giving a particular remedy is unqualifiedly repealed, the remedy is gone. Indeed, where a statute giving a special remedy is repealed by a later act which substitutes nothing in its place, the effect is to obliterate such statute as completely as if it had never been passed, and any proceedings taken subsequent to the absolute repeal of the law to which they owe their existence are coram non judice and void."
>
> 50 *Am. Jur.* pp. 535, 536, Statutes, § 539.

> "Where a statute prescriptive of a right unknown to the common law is repealed, the remedy is lost

whether the cause of action is still dormant or an action for its prosecution is pending."

Sutherland on Statutory Construction, 3rd Ed., Sec. 2050, Vol. 1, p. 537.

"The effect of repeal of a statute giving a special remedy [without a savings clause] is to obliterate it completely, and it must be considered as a law that never existed except for the purpose of those actions commenced, prosecuted, and concluded while it was an existing law." (Citing many cases). (Material in brackets added.)

Vance v. Rankin (Ill. 1902) 62 N.E. 807.

The rule has been applied by the Supreme Court of the United States.

In *South Carolina v. Gaillard,* 101 U.S. 433, 25 L.ed. 937. We quote from p. 438 of decision as reported in 101 U.S.:

"This tender was made when a special remedy for its enforcement was allowed. Before Trenholm availed himself of that remedy it was taken away, and he was remitted to such as he had before this Act, or such as were substituted on the repeal, * * *. But whether this be so or not, is unimportant, *because it is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.*" (Emphasis added.)

D. DID THE TRIAL COURT ERR IN REJECTING THE INTRODUCTION INTO EVIDENCE OF HOUSE BILL NO. 3? (R. 48, 55.)

Approximately 13 pages of appellant's opening brief are devoted to the legislative history of *the repealing act* and of the alleged failure of the lower court to give proper consideration to extraneous evidence, evidence which is said to have been available.

Most of this discussion deals with matters not only outside the record in this case but unfamiliar and unknown to appellees. Consequently, as a matter of necessity, as well as in accordance with the rules of this court, we will confine ourselves to the record.

Appellant's statement of point (4) and (5) (transcript 71, 72) and specifications of error (4) and (5) (page 12 appellant's opening brief) both confine themselves to the court's refusal to receive certified copies of H. B. No. 3 and S. B. No. 5 in evidence. The offer of proof (transcript 46) shows that only H. B. No. 3 was offered. There is no suggestion in the record that S. B. No. 5 was offered or otherwise brought to the court's attention except as it might have been judicially noticed by reference to the legislative journals. Nevertheless a copy of S. B. No. 5 appears in the transcript at page 53.

We are thus confronted at the outset with the contention that the trial court erred in refusing admission of evidence which was not offered. We refer to S. B. No. 5. Much of the other material in this section of appellant's opening brief is in the same theme. Appellant argues vigorously that the trial court failed to consider much valuable evidentuary matter re-

specting the legislative history of the bill and the intention of the legislators who enacted it. But nowhere is this alleged evidence or a summary of it set forth. Certainly it was not offered during the trial in the lower court. Nor would it have been admissible.

In our view the whole matter is beside the point. The only evidence offered was a certified copy of H. B. No. 3. The court rejected that but immediately took judicial notice of the legislative journals which established everything and more that could and would have been established by H. B. No. 3. The title to the bill and the various amendments offered, rejected and accepted, are all set forth in full in the journals and they are found in the appendix to appellant's opening brief.

Seemingly appellant would have the court consider the certified copy of H. B. No. 3 (and of S. B. No. 5 which was not offered below) and nothing else. If these documents are to be considered at all it must be on the theory that they are part of the legislative history. We do not think that they are. But if they are, they are not to be considered alone. The whole record must be examined. The legislative journals are a part, and we think the only proper part, of that record. Judge Dimond said in *Griffen v. Sheldon,* 11 Alaska 607, 78 F. Supp. 466, cited by appellant on this very point;

> "If reference must be made to the journals at all, then the reference should be complete and comprehensive for all proper purposes."

We do not desire to be understood as implying that the trial court erred in refusing to receive H. B. No. 3 in evidence. We find no case of record (and counsel has cited none) where courts have received exhibits or other evidence outside the record as to legislative intent. Evidence has been received to explain technical terms and expressions, not in common usage, which may be found in statutes under construction by the court and not defined therein. See *Order of Railway Conductors of America v. Swan,* 329 U.S. 520, 67 S. Ct. 405, 408, where the Supreme Court said:

> "(2) There is no statutory definition of "yard-service employees". Nor is the term explained in any of the relevant legislative debates or reports; and it derives no meaning from the statutory policy or framework. Moreover, it is not in common or general usage outside of the railroad world. It is a technical term found only in railroad parlance. Evidence as to the meaning attached to it by those who are familiar with such parlance therefore becomes relevant in determining the meaning of the term as used by Congress. See *O'Hara v. Luckenbach S. S. Co.,* 269 U.S. 364, 370, 371, 46 S. Ct. 157, 159, 160, 70 L.ed. 313."

The rule stated by the Supreme Court falls far short of permitting reception of evidence outside the legislative record for the purpose of establishing legislative intent. That the Supreme Court will not consider intermediate amendments and parliamentary maneuvers was amply demonstrated in 1947 when in the course of rejecting an argument "grounded in

conclusions drawn from changes without explanation in committee with respect to various provisions finally taking form" the court said:

> "Interpretations of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers"
>
> *Trailmobile Co. v. Whirls,* 331 U.S. 40, 61 S. Ct. 982, 992.

The journals show everything which appellant seeks to establish. Namely, that H. B. No. 3 as originally introduced would have "cancelled, repealed and abrogated" all accrued and unpaid taxes. It further shows that the bill was amended several times and that as finally enacted the section cancelling, repealing and abrogating accrued and unpaid taxes had been stricken and a new section inserted in lieu thereof. The new section provided that the repeal should not be applicable to taxes levied or to be levied during the current year by municipalities, school districts and public utility districts.

Under the well established rule, the court's taking judicial notice of H. B. No. 3 as abstracted in the journal obviated the necessity of proof thereof, so the court considered that bill regardless of whether or not it denied its admissibility into evidence.

20 *Am. Jur.* Sec. 16, Evidence, p. 46 et seq.

Similarly, if the court could take judicial notice of H. B. No. 3 upon the theory that it was a part of the legislative history, it could and undoubtedly did, even though not so stating, take judicial notice of S. B. No. 5.

The legislature had before it the Governor's veto message, (appellant's opening brief, p. 50, App. G), wherein the legislature's attention was specifically called to the Governor's message cited in appellant's opening brief, footnote 5, page 36.

Notwithstanding the House by 20 yeas to 4 nays, and the Senate by 11 yeas to 4 nays, one absent, overrode that veto and passed Chapter 22, *the repealing act,* as it is now before this court.

So, clearly the legislature intentionally saved only municipal, school and public utility taxes as stated in Section 2(a), Chapter 22, and as emphasized in Section 2(b), ibid., and did not save any taxes outside of municipalities, school and public utility districts. The incentive exemption for taxes outside of municipalities, school and public utility districts was not saved because there were no taxes to which such incentive exemption could apply.

What the legislature did is not in doubt or dispute. It considered legislation to repeal the act and cancel all accrued taxes. It considered legislation to repeal the act and cancel none of the accrued taxes. It adopted neither proposal. Judge Hodge correctly summarized the outcome when he said in his opinion:

> "Hence it is clear that the final decision of the legislature was neither to abrogate all accrued and unpaid taxes levied under the act, nor to save them, but to save only those taxes levied and assessed by municipalities, school and public utility districts."

MISCELLANEOUS MATTERS.

1. Remedy for the Collection of Tax on Personal Property.

The argument advanced on p. 22 of appellant's opening brief to the effect that *Chapter 10* as originally enacted provided no remedy for the collection of taxes on personal property is clearly untenable.

Prior to repeal of *Chapter 10* a complete remedy existed. Section 42 of *Chapter 10* (p. 24, App. A, appellant's opening brief) adopted the lien foreclosure procedure found in Section 22-2-8 to 22-2-18 A.C.L.A. by reference. The Tax Commissioner was instructed to proceed "in substantially the manner prescribed" by those sections. It is true that the sections adopted were from a chapter of the Alaska Code dealing with land registration. However, the procedure is as adaptable to personal property as to real property and it was clearly with that view and intent that the legislature adopted them by reference. Sections 22-2-6 and 7 A.C.L.A. 1949 which establish the remedy and the jurisdiction support this view.

2. Alleging Inequity of Lower Court Decision.

Appellant on page 61 of its opening brief infers that the result of the decision of the lower court is unjust as to those who paid the tax levied by *Chapter 10* and permits those who did not pay to "be endowed with favor". Appellant quotes the following language from the trial court's opinion "* * * however unjust such result may be as to those tax payers who paid the property tax *without protest*". (Emphasis supplied.) The following comments are pertinent.

(a) *Chapter 10* was enacted by the Territorial Legislature on February 21, 1949. Taxes became due and payable thereunder during that year. The Attorney General instituted no proceedings for collection until these actions were filed April 9, 1955. He allowed five years to elapse before asserting the Territory's right to collect by suit.

(b) In the meantime the validity of the act was under challenge and this court in *Mullaney v. Hess,* 13 Alaska 276, 189 F. 2d 417, decided on May 10, 1951, pointed out that property owners in Alaska had the right to pay the tax under protest and sue for its recovery. Before the litigation over the validity of the act was finally determined by the decision of this court in *Hess v. Mullaney,* 15 Alaska 40, 213 F. 2d 635 on May 25, 1954, the Territorial Legislature in March of 1953 repealed the act by the passage of *Chapter 10.*

(c) The taxes sought to be collected by this action are not "delinquent taxes" because they fell with the repeal and have ceased to exist. No effort is being made in this case to limit or oppose the taxing power of the Territory. The legislature has simply determined that a previously existing exercise of that power should be nullified by repeal. Our purpose here is to consider the effect and extent of that repeal. The statute under construction is not a revenue law but an act repealing a revenue law.

CONCLUSION.

Neither tax nor remedy survived the repeal. The motion to dismiss was properly granted. The judgment should be affirmed.

Dated, Juneau, Alaska,
July 14, 1956.

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